# JOINT STATEMENT OF OPPOSITION

# H.R. 2100 (Proposed Antitampering Act of 1999)

The undersigned represent many of the nation's major retailers, wholesalers, and trading companies, who employ hundreds of thousands of Americans and operate in every state in the union. The companies represented sell to millions of American consumers, and their reputation and commercial success depend on providing a broad range of high quality and safe products at competitive prices.

We understand the intent of H.R. 2100, the Antitampering Act of 1999. As we see it, that intent is to avoid tampering with those product identification codes that are used to protect consumer safety and assist with product recalls.

However, we are concerned with the actual language of the bill and its real consequences. It would punish a wide array of legitimate commercial activity. It would unnecessarily place new costs on commerce and consumers (unrelated to the real health and safety concerns).

**1. Excessive Burdens On Commerce—And New Costs To Consumers.**

H.R. 2100 goes far beyond protecting the integrity of those product codes used to assist in product recalls and consumer safety. For example, the bill would cover other markings that would have nothing to do with a product recall (some of them not even visible to consumers). It would expose legitimate retailers, wholesalers and other traders, and their employees, to new lawsuits, damages and even criminal penalties.

The bill ignores other realities of today's diverse marketplace. Major retailers and wholesalers handle enormous volumes of goods, most of which are shipped in sealed cartons. For a number of reasons (not the least of which is keeping costs low for consumers) a retailer cannot possibly open every sealed carton and inspect every item that comes across its loading docks. Further, even if a retailer could inspect every item in every carton, it would not necessarily discover if a code was changed or concealed. Yet, this bill exposes the retailer to new liability risks if a problem went undetected.

H.R. 2100 also harms a retailer's ability to deal with wholesalers and trading companies, some of which are small businesses. Each manufacturer's code will obviously be on products purchased directly from the manufacturer, but not necessarily on purchases from distributors and trading companies. By imposing new liabilities when one deals with a wholesaler or trading company instead of a manufacturer, this bill discourages purchases from wholesalers. That harms these small businesses. At a minimum, it increases the costs of buying from a wholesaler – costs that will necessarily be passed on to the consumer.

Transactions between wholesalers and retailers are important not only for the initial distribution of the product; they are also important when one retailer wants to dispose of excess inventories or out-of-season goods. A wholesaler purchases these excess inventories and makes them available to other retailers. If retailers perceive greater risks in buying this stock from a wholesaler, that will certainly restrict the flow of goods and reduce competition in the marketplace.

Perhaps more importantly, the broad language of H.R. 2100 will ultimately injure competition by allowing manufacturers to use their product codes to restrict the free flow of genuine goods. Again, the bill does not distinguish between codes that manufacturers place on their products for safety reasons (such as batch numbers to assist with product recalls) and codes manufacturers use to restrict the discounted re-selling of their merchandise. To combat against unwanted price competition, some manufacturers place other codes on their products so that they can identify—and ultimately cut off—legitimate sources of supply that resell to discounting

retailers to the benefit of the U.S. consumer.

### 1. The Problem Of The Overly Broad Definition Of "Product Identification Codes."

If this bill is to achieve its intended purpose of protecting consumers and product recalls, the definition of "Product Identification Code" must be more narrowly tailored to this purpose. A Product Identification Code must be, and only be, relevant to product recalls and other legitimate consumer safety communications.

### 3. The Problem Of Retailer And Reseller Liability.

H.R. 2100 imposes new civil and criminal liabilities on retailers and wholesalers, which will certainly add costs and burden commerce and amount to draconian measures against legitimate retailers, wholesalers and other distributors. Liability should not rest upon legitimate business operations that may (without actual knowledge) end up with affected product in the millions of units they routinely handle.

The current commercial reality is that retailers and other resellers deal in container loads of products and do not have the opportunity to physically inspect individual packs of film or individual bottles of hair spray. These businesses should not risk liability for these legitimate, and legal, business practices.

### 4. The Problem of Repackaging.

Under current law and commercial practice, retailers and wholesalers may obtain genuine goods and repackage them for ultimate sale to consumers. These can include "value packs" of two or more of the same items (such as a shrink wrap pack of two breakfast cereals) or an assortment of related items (a blister pack of five carpenter's tools). Or they can include special "display packs," where a single item is placed in a clear plastic pack that can be more easily hung on a circular display rack.

At times, wholesalers also help retailers with product promotions by combining two different products, such as a toothbrush and toothpaste, using shrink-wrap to create a multi-unit arrangement. In most cases, the new combinations have a reduced price, which benefits consumers.

The U.S. Supreme Court has long recognized the right of third party purchasers to repackage trademarked consumer products. Anyone who purchases a product, "by virtue of its ownership, has a right to compound or change what it bought, to divide either the original or the modified product, and to sell it so divided" or repackaged. *Prestonettes, Inc. v. Coty*, 264 U.S. 359, 368 (1924). The sole requirement is that "the public is adequately informed" about the fact that a repackaging has occurred and who has done the repackaging. *Id.* at 369. Today, as long as there is a label on the repackaging that identifies the fact of the repackaging and who did it, a manufacturer cannot complain. *Enesco Corp. v. Price/Costco Inc.*, 146 F.3d 1083 (1998).

H.R. 2100, however, only allows repackaging in shipping containers, but not repackaging in consumer packages. It only purports to apply to distributors but not retailers—and only if the purpose is to provide a quantity different from the quantity provided by the manufacturer (but not if the purpose is to create a new assortment package or type of display pack). The bill does nothing to protect the full range of current and legitimate practices.

**5. The Problem of UPC Codes.**

A UPC code is used to permit electronic scanning at the checkout stand. It is not used to identify a production number used in product recalls.

H.R. 2100 does not address situations where a retailer or wholesaler will designate a third-party to repackage a particular product and affix a new UPC code. Of course, when new UPC codes are added, they do not take the place of product identification codes. Those product identification codes are still available for the consumer in case of a product recall.

**6. State Versus Federal Standards.**

Some States are beginning to adopt a variety of statutes to deal with issues that would be covered by H.R. 2100. Yet, inadequate thought has been given to how H.R. 2100 would relate to these state laws.

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The ramifications of H.R. 2100 are much too important to allow this bill to go forward. We would welcome the opportunity to discuss with you further the issues set forth in this correspondence.

**NATIONAL ASSOCIATION OF CHAIN DRUG STORES**

**INTERNATIONAL MASS RETAIL ASSOCIATION**

**AMERICAN FREE TRADEASSOCIATION**

**PURITY WHOLESALE GROCERS, INC.**

**VICTORY WHOLESALE GROCERS, INC.**

**COSTCO WHOLESALE CORPORATION**

**FOOD MARKETING INSTITUTE**

**WAL-MART STORES, INC.**

**KMART CORP.**

**House Subcommittee On Courts And Intellectual Property**
**Committee of the Judiciary**

United States House of Representatives
Hearing on
H.R. 2100, the "Antitampering Act of 1999"

October 21, 1999
Washington, D.C.

Testimony of Gilbert Lee Sandler, Esq.

SUMMARY STATEMENT OF THE TESTIMONY SUBMITTED
ON BEHALF OF
AMERICAN FREE TRADE ASSOCIATION
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## SUMMARY STATEMENT OF THE AMERICAN FREE TRADE ASSOCIATION

H.R. 2100, the Anti-Tampering Act of 1999, is an anticompetitive piece of legislation with the sole intention of eliminating the parallel marketplace.

The parallel marketplace is an essential part of the American economy, employing hundreds of thousands of citizens and supporting tens of thousands of tax-paying business. The industry has been upheld by the Supreme Court (in 1988 *Kmart v. Cartier* and in 1999 *Quality King v. L'Anza*) and is supported and desired by American consumers. As a result, the supporters of H.R. 2100 rely on emotional rhetoric to intentionally disguise the true effects of this bill. Couched in language alleging a relation to consumer health and safety, the Anti-tampering Act of 1999 is solely an effort to enable a manufacturers' monopoly on the American marketplace.

The product identification codes protected as a result of H.R. 2100 are useless in the event of a consumer safety product recall. They may be invisible, undefined, indistinguishable and hidden in a morass of other unrecognizable product and package markings. Uniformly, however, these product identification codes identify the source of secondary marketplace products. These codes are removed in order to protect legitimate businessmen from unwarranted and anticompetitive retribution, retaliation and punishment. Manufacturers need to strike out at these suppliers because they offer American citizens less expensive genuine articles without discriminating between location, consumer or retailer.

Positioned last year as a measure to combat counterfeiting activities and this year as necessary to protect against product tampering, H.R. 2100 ignores the commercial realities that demand respect for intellectual property and product integrity. Parallel marketers maintain the value of a product's intellectual property in order that the demand for brand name merchandise continues and protect their products against tampering because future dealings with retailers and wholesalers depend upon reputation and quality. H.R. 2100, however, would make normal, legal activities such as offering "value packs" or "special offers" illegal, and, if passed, would cause thousands of small, tax-paying businesses to close overnight and brand legitimate businessmen as criminals.

The Anti-tampering Act of 1999 is an attempt for legislative support of anticompetitive and monopolistic activities in a marketplace founded on the belief of free trade and unfettered competition. H.R. 2100 is the manufacturers' method of overturning literally a century of legal and popular support for the parallel marketplace---an industry that forces manufacturers to refrain from indiscriminate price fixing and monopoly. The Anti-tampering Act of 1999 is an anti-consumer piece of legislation clearly intended to overturn the Supreme Court and deny American consumers the right to discounted brand name merchandise.

Parallel traders do *not* remove batch codes or expiration dates that protect consumer health and safety. And H.R. 2100 is *not* legislation intended to protect consumer health and safety. Parallel marketers protect suppliers of genuine resold merchandise and H.R. 2100, by protecting hidden, undefined and arbitrary product markings, is a bill enabling the manufacturers' to punish those distributors and forever eliminate the parallel marketplace.

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## STATEMENT OF THE AMERICAN FREE TRADE ASSOCIATION

It is a privilege and honor to appear before this Subcommittee and address the serious economic consequences of H.R. 2100, the Antitampering Act of 1999.

This testimony is offered on behalf of the American Free Trade Association (AFTA). The American Free Trade Association is a not-for-profit trade association of independent American importers, distributors, retailers and wholesalers, dedicated to preservation of the parallel market to assure competitive pricing and distribution of genuine and legitimate brand-name goods for American consumers. The parallel market embraces a broad range of products but AFTA's members are primarily involved in sale and distribution of fragrances, colognes, health and beauty aids (e.g. shampoo, soap, etc.).

AFTA has been an active advocate of parallel market interests for over fifteen years. It has appeared as *amicus curiae* in the two leading Supreme court cases affirming the legality of parallel market trade under the federal trademark, customs and copyright acts (the 1985 *Kmart* case and the 1998 *Quality King* case) and in numerous lower court decisions.

## I. THE ANTITAMPERING ACT OF 1999 DOES NOT STOP PRODUCT TAMPERING

H.R. 2100 has nothing to do with product tampering --- in fact, the bill could more accurately be called the "Anti-Consumer Act" or the "Anti-Competition Act" because H.R. 2100

intends to eliminate competition, overriding the interests and wishes of the American consumer.

The title of the "Antitampering Act" is appealing and misleading, similar to the title of the identical bill which failed to pass in the last Congress -- the "Anticounterfeiting Act of 1998" (H.R. 3891). Neither the "Antitampering Act" or the "Anticounterfeiting Act" addresses the problems of counterfeit or tampered products; both bills attempt only to restrict distribution and raise prices of genuine and safe goods traded in the parallel market channels of distribution. H.R. 2100 would effectively overturn two Supreme Court decisions and defy years of historical support and legitimacy of the secondary marketplace, without any consideration of this stunning change in United States law and economics.

The bill would create federal criminal or civil liability for removing, altering or obliterating product codes, or for selling products with removed, altered or obliterated product codes; the Antitampering Act of 1999, however, has no remedies or intended punishments for selling or tampering with consumer products. H.R. 2100 protects product codes that are unrestricted, unregulated, arbitrary as to their nature, placement, content or use. These codes do not even have to be visible to the consumer, retailer or wholesaler. Moreover, the codes are clearly not limited to the batch codes used for product recalls, but extend to the "secret" codes historically used to identify and retaliate against sources of parallel market goods. H.R. 2100 is about empowering manufacturers and trademark owners to exclusively control the American marketplace; it is not about protecting consumers from unsafe products.

The bill's sponsors and advocates have misunderstood or misrepresented what this legislation is about. H.R. 2100 is not about protecting the health and safety of the consumer.

H.R. 2100 is about protecting the profit and power of manufacturers by providing federal criminal and civil penalties for removal of codes placed on merchandise in any fashion and for any purpose. The historic use of codes to retaliate against legitimate parallel market competition clearly establishes that this bill should not be adopted and that the Congress should not be beguiled by the misnomer of the "Antitampering" language.

## 2. THE DIFFERENCE BETWEEN LEGISLATION INTENDED TO PROTECT THE CONSUMER AND LEGISLATION INTENDED TO PROTECT BIG BUSINESS

The Congress has adopted a wide-range of bills that thoughtfully and effectively protect consumers from defective and unsafe products. The labeling and branding of foreign and domestic merchandise is regulated under the *Federal Food Drug and Cosmetic Act*. See 21 U.S.C. 331 (misbranding of any food, drug, medicine and liquor); 334 (food, drug, device or cosmetic), 342 and 342 (food); 350a (infant formulation); 351 and 352 (drugs and devices) and 361 and 362 (cosmetics), as well as the *Federal Meat Inspection Act* (21 USC 601, et. seq); and consumers are protected against deception, confusion and unfair competition as a result of *The Lanham Act* (15 USC 1051, et. seq.); *The Copyright Act* (17 USC 101, et. seq.); *The Tariff Act* (19 USC 1526) and *Anticounterfeiting Consumer Protection Act of 1996* (15 USC 1116-17; 18 USC 2320). The legislative history of all of this legislation clearly reveals an intention to protect American consumers from harm and a genuine concern for their well- being.

H.R. 2100 seeks to amend the *Lanham Act*, one of the most critical existing consumer protection statutes. Despite initial objections from the Department of Justice that the legislation

would enable monopolies to thrive and anti competitive practices to flourish, the *Lanham Act* was passed in 1946 as a measure intended to protect consumers against confusion and deception in the marketplace. But protecting hidden, undefined, arbitrary markings and codes does not protect consumers against confusion, and, in fact, enables potentially very monopolistic behavior. It is deceiving for the authors of H.R. 2100 to draft an amendment to the *Lanham Act* that belies its very intention and thwarts the multitude of consumer protections provided in its existing text.

The broad, sweeping and undefined provisions of H.R.2100 stand in sharp contrast to the existing bills, noted above, which clearly and transparently protect the American consumer. H.R. 2100 is said to protect "product identification codes" from alteration or obliteration or removal or destruction. According to the bill's sponsors, these "product identification codes" are necessary to protect the consumer because they are an important part of any effective product recall for safety concerns. This is not true, however, since H.R. 2100 protects codes which are not intended for product recalls and could never be used for such recalls.

## 3. WHY MANUFACTURERS BELIEVE THEY ARE ENTITLED TO H.R. 2100

For over 15 years, AFTA has been involved in fighting for the rights of the parallel marketplace. The parallel marketplace has, in fact, been present in this country since before the turn of the century. The first published conflict between a manufacturer and a parallel importer goes back to 1886 in Appollinaris Co. Ltd. v. Scherer, 27 F 18 (CC SDNY 1886). In that case, the Circuit Court for the Southern District of New York declined to enjoin an early parallel importer from importing goods bearing a mark legitimately affixed by a foreign manufacturer. .

Since 1886, efforts to limit or eliminate parallel market competition have been mounted in Congress, the Courts and the Executive branch under virtually every conceivable law, including our customs laws, trademark laws, copyright laws, patent laws, the uniform commercial code and, antitrust laws. But, these efforts have failed. As recently as 1998, by the Supreme Court's decision in Quality King v. L'Anza International Research (holding that manufacturers may not rely upon the U.S. copyright law to bar reimportation of domestically manufactured products), or in 1999 with the final Customs regulations implementing the decision in the *Lever Brothers* case (parallel imports will be allowed even for products determined to be materially different from those authorized for U.S. distribution so long as they are labeled to identify that they are unauthorized merchandise), manufacturers have been stopped in their attempts to quash this desired, legitimate business practice of supplying consumers with more -- and less-expensive-- branded merchandise.

Accordingly, in 1998, - not long after the Supreme Court rejected the copyright theory for eliminating the parallel market in its holding in Quality King v. L'Anza – the battle shifted to the Congress with the introduction of H.R. 3891 the "Anticounterfeiting Act of 1998." We

firmly believe this bill would have effectively wiped out the secondary marketplace-- although, on its surface, it did not appear to contradict the Supreme Court's rulings or the historic support of the parallel market. H.R. 3891 failed in 1998, and, so, in 1999 it has resurfaced as H.R. 2100 --- legislation that, again, does not appear to obviously eradicate an industry desired by the American consumer and legitimized by America's court systems and administrative bodies. Nevertheless, this is exactly what it will accomplish.

## 4. THE PARALLEL MARKETPLACE

Parallel Goods are genuine trademarked consumer products, such as fragrances, 35 mm cameras, electronic products and watches which are imported, distributed and/or sold in the secondary marketplace by independent American businesses rather than by "authorized" U.S. dealers. The parallel marketplace exists primarily because the manufacturers, for reasons of their seek significantly higher prices for their products in the United States than elsewhere in the world. They often do this by creating wholly-owned or controlled subsidiaries in this country, designating those companies as the exclusive "authorized" importers and distributors for their products here, and refusing to sell to retailers and distributors who will not maintain the higher prices for the products.

The obvious result in a free enterprise, free trade market is that independent American businesses can purchase the same products overseas at the less expensive world price, often directly from the manufacturers' "authorized" distributors abroad. These same businesses often

purchase the genuine products domestically, either from authorized distributors or from the manufacturers themselves. The foreign manufacturers' price differential for the U.S. market is often so great that, even after paying shipping costs and U.S. Customs duties, the parallel importer can offer the identical articles for twenty to forty percent less than the U.S. "authorized" distributor. Domestically, manufacturers and authorized distributors support the secondary marketplace with excess inventory, overruns and other legitimate product sources.

The result is a saving to American consumers amounting to billions of dollars a year. Another result is the availability of popular products to a much wider spectrum of Americans who do not live in the large cities where the exclusive authorized stores are generally located. The parallel trade has also served as an independent bulwark against unrestrained increases on the domestic price of brand name consumer goods as compared to prices available worldwide.

## 5. CONSEQUENCES OF H.R. 2100

If passed, H.R. 2100, the Antitampering Act of 1999, willseeks to eliminate the parallel marketplace. According to Michael Spano, executive director of the Beauty and Barber Supply Institute (Women's Wear Daily, September 10, 1999 "Diversion Bill Splits Hair Industry" --- see Attachment 1) proponents of the bill believe it will "help stem diversion because it would make illegal one of the chief aids to product diversion --- removal of coding that allows manufacturers to trace a product to the final buyer." "Diversion" is a prejorative term used to describe the activities of the parallel marketplace. Accordingly, there is no mystery; the supporters of H.R. 2100 believe, and intend, that the legislation will eradicate parallel market

competition because it will make illegal product decoding.

It is important that the Committee members understand why certain coding is removed from parallel goods. When a legitimate parallel market businessman purchases brand name products for resale, he or she is obligated to protect the source of those products from retaliation by the manufacturer. If the product source has excess inventory or unsellable product, it will oftentimes sell these products to resellers in order to make them available to consumers who otherwise may not have access to the goods. The manufacturer has already made its profit --- the manufacturer sold the genuine article to its authorized distributor. That distributor is now obligated to make its own profit, and oftentimes supplies excess inventory to parallel marketers. Despite the fact that this activity is legal --- despite the fact that this activity benefits the consumer --- despite the fact that this activity promotes and encourages a free and competitive marketplace---- manufacturers will almost certainly retaliate against that distributor or its supplier for supplying products to the reseller. Manufacturers place arbitrary and often hidden codes on merchandise in order to identify these sources. Manufacturers want to identify the sources so that they may exclusively control distribution of brand name products. Parallel traders remove these codes to protect their distributors and facilitate the competition created by the secondary marketplace.

Mr. Spano claims, however, that H.R. 2100 protects only batch codes, stating that parallel marketers remove batch codes and expiration dates. But that is not true. Parallel marketers do not remove batch codes or expiration dates because these markings *are* important

in the event of consumer product recalls.

Parallel marketers only remove codes that identify the sources of parallel goods; the codes which are designed to enable restricted distribution and price control of brandname products H.R. 2100 will eliminate the availability of discounted merchandise because, by protecting these codes, it will enable manufacturers to retaliate against secondary marketplace distributors and their suppliers so that these sources will be forced not to support the secondary marketplace

## 6. THE DIFFERENCE BETWEEN BATCH CODES AND "PRODUCT IDENTIFICATION CODES"

H.R. 2100 broadly defines "product identification codes" as "...any number, letter, symbol, marking, date (including an expiration date), code, software, or other technology that is affixed to or embedded in any good..." But "product identification codes" may be invisible- and often are. "Product identification codes" may be unrecognizable symbols or hieroglyphics. "Product Identification Codes" may be unidentified in a morass of 20 or 30 product markings.

*WWD September 10, 1999*



September 10, 1999

**SECTION:** Pg. 12 ; ISSN: 0149-5380

**IAC-ACC-NO:** 55755028

**LENGTH:** 2104 words

**HEADLINE: DIVERSION** BILL SPLITS HAIR INDUSTRY.

**BYLINE:** Naughton, Julie

**BODY:**

NEW YORK -- The shampoo wars continue -- and the hostilities are about to spill onto the floor of Congress.

Legislation that could affect sales of salon or professional hair care brands in unauthorized nonsalon retailing environments is ready to head to the House floor by mid-October -- and both the professional and mass channels are taking sides in a battle reportedly worth more than $ 100 million a year to the $ 4.1 billion salon products industry. House Resolution 2100, the Anti-Tampering Act of 1999, was introduced in the House June 9 by Rep. Bob Goodlatte (R, Va.) and Rep. Zoe Lofgren (D, Ca.) HR2100. It would criminalize the actions of diverters who damage, deface or cover batch, bar or other manufacturing codes on products, making such actions a Federal offense.

Such legislation addresses the issue of **diversion,** which has polarized the salon or professional industry and the retail beauty industry for more than 20 years.

Salon, or professional beauty brands, are intended by their manufacturers for sale only in salons and beauty supply stores, and those manufacturers cite both consumer safety and the products' images in their fight to keep items exclusive. They argue that they have the right to sell their products where they want -- and for years have put restrictions in their distributor contracts preventing resale to outlets outside the salon industry.

Opponents argue that such regulations restrict free trade and penalize legitimate secondary markets.

Proponents of the upcoming legislation say it would help stem **diversion** because it would make illegal one of the chief aids to product **diversion** -- removal of coding that allows manufacturers to trace a product to the final buyer, said Michael A. Spano, executive director of the Beauty and Barber Supply Institute.

BBSI, which represents product distributors, and a manufacturers' organization called the American Beauty Association, are leading the professional industry fight.

**Batch codes** generally contain information on specific batches of products, including where and when the products were bottled and to whom they were sold. Bar codes include stockkeeping unit information, prices and more.

Middlemen who purchase merchandise and resell it to drugstores, grocery stores and other retail outlets often scrape off bar or **batch codes** so they cannot be traced to the salon or distributor that originally purchased the products, said Spano.

"In our industry, **batch codes** make sure that consumers get properly mixed product that conforms to the laws of the various states, they help keep consumers from using professional-only products, which sometimes contain chemicals or dyes that should be applied only by trained and licensed cosmetologists, and they help trace tainted or stolen goods," said Spano.

Opponents of the bill say it will restrict legitimate secondary-source selling through intimidation.

The mass market industry -- in particular, the National Association of Chain Drug Stores -- opposes the legislation. According to David Lambert, NACDS vice president of government affairs, many mass merchants obtain products from legitimate secondary sources.

"If company 'A' buys too many widgets [from the manufacturer] and then resells them to company 'B,' we don't want the manufacturer coming back and refusing to sell to company 'A' because they don't like where the product ended up," Lambert said.

"Our argument is that once the product has left the hands of the manufacturer, that should be the end of the manufacturer's control over the product. Otherwise, you are giving the manufacturer an excessive amount of control over distribution, which hampers free trade."

However, Lambert emphasized, "While we oppose HR2100, we do not support the sale of counterfeit or stolen products. In fact, retailers -- including the chain drugstore industry in particular -- suffer from counterfeit products as much as anyone else. We have no desire to sell products that have been obtained illegally, and we are exceptionally concerned with public safety. Our concern is only that legitimate secondary markets may be impeded by HR2100.

"Among those in favor of HR2100, it is frequently mentioned that these codes would facilitate recalls and insinuate that we're scratching them off," he continued.

"In fact, there are many product codes used to recall products, and they are not generally removed on products in the legitimate secondary market. We have been characterized by some as being callous regarding counterfeit products, when, in fact, we are not. Instead, we are concerned with retaliation by manufacturers against retailers."

Lambert said since such codes apply to items other than beauty products, the

proposed legislation could impede retailer operations.

"Under HR2100, if you cover one code -- which could happen, say, if you have two products shrink-wrapped together with a third stockkeeping code for the set -- you could be in violation of the law. Also, the language is very vague. We expect to oppose it in its current form, and we think other retailers groups will, also."

The legislation will be considered first by the subcommittee on courts and intellectual property of the House Judiciary Committee, probably in early to mid-October, and could be voted on by the full House by late October or early November, said John Bliss, a lobbyist for the professional beauty industry.

There is more than lofty ideals at stake -- like money. Estimates vary widely as to how much product **diversion** to the mass industry costs the professional industry each year. However, it probably tops $ 100 million, according to estimates from the BBSI.

J. Aaron Graham, director of assets protection for Matrix Essentials, a division of Bristol-Myers Squibb and a proponent of the bill, insisted it's about much more than money.

"The issue is not about price and it never was," he said. "It's solely about protecting the consumer from potentially serious bodily harm resulting from the sale of counterfeit, expired or adulterated consumer merchandise. Salon clients can purchase their salon products in authorized salons, where the salon and the manufacturer guarantee the quality of the merchandise."

According to Spano, chief proponents of HR2100 include the professional beauty industry, the Coalition to Protect the Integrity of American Trademarks and allies like the pharmaceutical industry.

If the bill passes, it would affect several other industries, including the pharmaceutical industry, he said.

This isn't the first time such legislation has headed to the floor. An earlier version, HR3891, the Anti-Counterfeiting Bill, narrowly missed passing the House on Sept. 28, 1998.

That bill, however, was on a "fast-track" system that required that it pass a House vote with a two-thirds majority -- and proponents of the new bill said they were confident it would pass this time because only a simple majority is required.

"We think that this time, it will be put on the regular calendar," said Bliss. "And, in fact, we were only 78 votes shy of getting a two-thirds majority in the House last time, so we feel pretty confident."

Spano said HR3891 had been drafted by a coalition of clothing, fragrance and chemical companies.

"The professional beauty industry came in after that bill was written," he said. "Also, while Congress doesn't see counterfeit apparel as a risk to public safety, they acknowledge that tainted hair color or baby formula could hurt consumers, and the

new legislation specifically includes these items."

While Spano acknowledged the legislation was unlikely to eradicate **diversion** -- "Wherever there is a demand, you're going to see **diversion** happen," he said -- he insisted the passage of such a law would "dramatically stem the problem, and it will send a message that we are serious about facing this issue."

HR2100 has gained support from a number of beauty manufacturers.

"Such a law would allow law enforcement officials to make arrests and seizures of products," said Graham.

"Ten years ago, there weren't many effective ways to deal with this problem," Graham continued.

"You started a letter-writing campaign, someone got their wrist slapped and it started all over again. But with a law? When there are handcuffs coming your way, people are quicker to acquiesce. No one wants to go to jail for shampoo."

Paul Dykstra, executive director of the ABA, said the legislation would send a message that consumer safety is paramount. "First and foremost, we are concerned with consumers," said Dykstra.

"We want them to be confident of their safety. Bills like this would help assure that."

Unlike the current initiative, previous legal and legislative efforts to restrict the sale of professional products in other channels have usually focused on trademark infringement and copyright issues.

In many of these cases, state and Federal courts have ruled in favor of mass marketers, "which has prevented other industry manufacturers from using such issues to restrict or prevent the sale of goods in secondary markets," said Spano.

Previous rulings have also stated that copyright law does not protect U.S. manufacturers that export products from having their products shipped back by an unrelated company.

In 1998, the U.S. Supreme Court ruled against L'anza Research International in such a case. According to published statements made by L'anza at that time, it had sued Quality King Distributors, arguing that it was deprived of its "first sale rights" under copyright law when Quality King bought L'anza products intended for distribution in Malta and Libya at a deep discount from a L'anza distributor in the United Kingdom and then resold them to a Carmel, Calif., drugstore chain.

L'anza won $ 3.4 million in a lower court ruling, but the decision was later overturned by the U.S. Supreme Court.

More recently, Albertson's grocery chain, based in Boise, Idaho, filed a Federal antitrust lawsuit against professional manufacturer Sebastian International in March, charging obstruction of free trade. The suit is pending.

There are some laws at the state level. According to Graham, at least two states have laws that prevent anticounterfeiting or code tampering.

A Texas statute prohibits the alteration or removal of **batch codes,** he said.

Similar legislation was passed earlier this year in Oklahoma; Title 21, Section 1990 of Oklahoma law "protects consumers against traffickers of counterfeit consumer goods" in such categories as infant formulas, health and beauty aids and over-the-counter medications, said Graham.

According to Graham, Matrix has already seen results from that law.

"Using the weapons of Oklahoma's new anticounterfeiting legislation and our aggressive antidiversion staff, we persuaded Tulsa's Drug Mart and May's Drug, a related company, as well as several other unauthorized retailers of salon-only hair care products, to remove all professional hair care products from their retail shelves," said Graham. "We're very anxious now to make sure that HR2100 gets passed."

Earlier this year, the beauty industry formed The Professional Beauty Federation, a nonprofit group that raises money to lobby on industry issues, and hired Bliss, the former president of the International Anti-Counterfeiting Coalition, as its lobbyist.

The federation's founding members were five salon industry groups: the International Chain Salon Association, The American Association of Cosmetology Schools, the BBSI, the National Accrediting Commission of Cosmetology Arts and Science and The Salon Association.

Spano said the BBSI has encouraged all its members to call their Congressional representatives and has raised more than $ 200,000 for awareness campaigns and lobbying efforts from member distributors, board members and professional manufacturers, including Nexxus, Cosmair's Redken Fifth Avenue division, The Wella Corp. and John Paul Mitchell Systems.

Professional beauty firms have taken such measures as developing involved tracking systems, creating embedded or holographic bar coding, initiating lawsuits -- and in some cases, hiring former FBI agents as "shampoo cops" devoted solely to scouting out sales to unauthorized retailers.

Some manufacturers, such as Shiseido's Brands Exclusive Zotos International division, are offering cash for information on diverters.

In May, Bezi announced it would give a $ 1,000 reward to anyone reporting verifiable information that stopped sales of diverted products.

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